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HUMAN RIGHTS COMMITTEE

Seventieth session

SUMMARY RECORD OF THE 1874th MEETING

Held at the Palais Wilson, Geneva,
on Thursday, 19 October 2000, at 10 a.m.

Chairperson: Ms. MEDINA QUIROGA

later: Mr. AMOR
(Vice-Chairperson)

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GE.00-45195 (E)

The meeting was called to order at 10.05 a.m.

ORGANIZATIONAL AND OTHER MATTERS (agenda item 2) (continued)

1. The CHAIRPERSON announced that earlier that morning the working group headed by Mr. Klein had held a fruitful meeting dealing with amendments to the rules of procedure and the final wording of the document to be produced by the group.

2. Concerning the forthcoming informal meeting with States parties, she asked members to notify her of any issues they wished her to raise in her introductory statement.

3. Mr. Amor (Vice-Chairperson) took the Chair.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 5)
(CCPR/C/66/R.8/Rev.1)

Draft general comment on article 4 of the Covenant

4. Mr. SCHEININ drew the Committee's attention to document CCPR/C/66/R.8/Rev.1, containing his second draft of the general comment on non-derogable rights. At its July session, the Committee had dealt with paragraphs 1, 3, 4 and 5, and he proposed that it should now take up paragraph 6.

5. The CHAIRPERSON invited Mr. Scheinin to introduce the paragraph.

Paragraph 6

6. Mr. SCHEININ said that his text was intended to clarify what was meant by the reference in article 4 to other international obligations preventing a State party from using that article as a basis for derogating from the provisions of the Covenant. Two sources of other obligations were identified - international treaties and customary international law.

7. The reference to other international obligations did not mean that international treaties applicable in normal times would continue to have their full effect in times of emergency. However, to the extent that they were applicable, the statement in article 4 that the Covenant did not allow derogations from its provisions if those derogations resulted in conflict with other international obligations of the State in question became relevant.

8. In view of the fact that article 5.2 of the Covenant also covered the notion of derogation, it might be appropriate to include a reference to it in paragraph 6.

9. Mr. KLEIN said it was a clear rule of public international law that one treaty could not justify derogation from the rules of other treaties. However, article 4.1 of the Covenant went a step further by stating that such derogations could only be made if they were not inconsistent with other obligations under international law. In his view, the fourth sentence did not make that sufficiently clear. He proposed that it should be amended to read "To the extent that such rights have to be respected under the other treaties in question, article 4 cannot be read ...".

10. Ms. EVATT agreed that a wider statement in regard to treaty obligations was needed. The paragraph could be strengthened by the addition of a sentence reading "Furthermore, article 4, paragraph 1, does not authorize any derogation from the obligations which a State has under customary international law".

11. Mr. KRETZMER said that, in his view, the point raised by Mr. Klein would be covered by the deletion of the words "To the extent that such rights are non-derogable under the other treaties in question" in the fourth sentence.

12. Mr. HENKIN suggested that the paragraph should include a specific reference to obligations under the United Nations Charter.

13. Ms. EVATT said that if Mr. Kretzmer's suggestion was adopted, the paragraph could be further simplified by adding "whether these arise under a treaty or under customary international law" at the end of the fourth sentence.

14. Ms. CHANET said she did not think it necessary to refer specifically to the Charter since that instrument was already covered by the words "their other obligations under international law". She supported the addition of a reference to article 5.2.

15. Mr. SCHEININ agreed with Ms. Chanet that it would be preferable not to refer to the Charter, since that would extend the scope of the paragraph to cover many different kinds of obligation. It would be better to restrict it to obligations in regard to human rights.

16. Mr. HENKIN said he would not press his proposal.

17. Paragraph 6, as amended, was adopted.

Paragraph 7

18. Mr. SCHEININ said the paragraph made the point that when States invoked their right to derogate from the Covenant, they should inform the Committee of their other relevant international obligations.

19. Mr. KRETZMER suggested that the beginning of the paragraph should be amended to read "Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties or under customary international law, the Committee has the competence to take a State party's other international obligations into account ... etc.".

20. Ms. EVATT suggested that States might be asked to address the question of their other relevant treaty obligations when preparing reports under article 40.

21. Mr. SCHEININ said the text would be amended to take that suggestion into account.

22. Mr. SOLARI YRIGOYEN said he too was concerned about the wording of the first sentence. He believed that as a general rule the Committee should not make negative observations on its own competence. He therefore supported Mr. Kretzmer's proposal.

23. Ms. CHANET supported that proposal. She suggested that the words 'in the exercise of its functions under the Covenant" be added before "the Committee has the competence". It was important to make clear in the last sentence that it was paragraph 1 of article 4 that was being referred to.

24. Paragraph 7, as amended, was adopted.

Paragraph 8

25. Mr. SCHEININ said that the paragraph drew attention to the fact that there might be other situations where certain rights could not be derogated from if the full text of article 4 was respected. The paragraph listed what were generally understood as peremptory norms (jus cogens) in the field of human rights, and observed that the prohibition of the taking of hostages and the imposition of collective punishments could be added to that list.

26. Mr. KRETZMER said it was clear from article 4.2 that there were two types of provision from which no derogations could be made, one relating to the peremptory nature of the right itself (arts. 6 and 7) and the other relating to the fact that there could be no connection between a state of emergency and those rights (art. 11). It was not clear whether "certain fundamental rights" in the third sentence referred to all or some of the rights covered by article 4.2. It was also not clear to him what was meant by the words "severe discrimination" in the fifth sentence.

27. Concerning the sixth and seventh sentences, as he saw it the examples given were already covered by what had been stated earlier regarding derogation from other obligations under international law. There was no way a State party could make a derogation allowing it to take hostages or to impose collective punishments without being in breach of those obligations. He would appreciate clarification on that point.

28. Ms. EVATT said she too had concerns about paragraph 8. It was true that the non-derogable rights outlined in article 4 were in some cases the same as those protected by customary international law. However, those rights did not exactly coincide because not all the rights stated to be non-derogable fell into the category of peremptory norms. On the other hand, not all peremptory norms were expressly mentioned in article 4.2, but they were all covered in paragraph 1 because they were part of the obligations of the State party under international law.

29. She suggested that the first sentence should be deleted. The third sentence needed to bring out more clearly the point that of the provisions mentioned in article 4.2 some might well be fundamental rights of international law. The examples given in the last two sentences should perhaps be included in a general discussion of customary international law norms which could not be derogated from even though they were not expressly mentioned in article 4.2.

30. Mr. KLEIN said that it was appropriate to draw a distinction between rights that were non-derogable under article 4.2 of the Covenant and provisions of general public international law that constituted an impediment to derogation. It was basically immaterial in the context of the Covenant whether the rights listed in article 4.2 were peremptory norms of international law (jus cogens). Other rights, however, might be non-derogable solely on the grounds of their peremptory nature. He therefore agreed with the content of the last sentence of paragraph 8 but

suggested that it be reworded to read "States parties may not invoke article 4 of the Covenant as justification for taking hostages by derogating from article 9 of the Covenant or for imposing collective punishments by derogating from article 14 (...)".

31. Ms. CHANET agreed that the fact that certain derogations prohibited under article 4.2 were also recognized as peremptory norms under other instruments was immaterial. It might even be dangerous to list the obligations concerned because, for example, articles 11 and 15 of the Covenant had not been given "hallowed status" under any other instrument. Moreover, the impact of article 4.2 as a whole was lessened by drawing attention to the fact that some of the rights involved were also enshrined elsewhere. It implied that there was a hierarchy of rights. There was also a risk of inconsistency with General Comment No. 24 on reservations, in which the Committee had identified what it perceived to be peremptory norms of international law. The part of paragraph 8 that mentioned articles 9 and 14 of the Covenant, however, referred only to the taking of hostages or the imposition of collective punishment and omitted to mention such fundamental principles as the presumption of innocence and the prohibition of arbitrary arrest and detention.

32. Mr. HENKIN said there was a real danger that the lists were incomplete. If lists were necessary, they should be preceded by the words "for example" or "notably".

33. Mr. SOLARI YRIGOYEN said that he agreed in principle with the content of paragraph 8. It was appropriate to refer to the non-derogable rights in article 4.2 and the existence of other norms that were non-derogable. Ms. Chanet had mentioned the presumption of innocence as one of those norms. He would add the provision of article 10 to the effect that all persons deprived of their liberty should be treated with humanity. The paragraph should be reworded to ensure that the lists did not appear to be exhaustive or restrictive.

34. Mr. YALDEN endorsed the view that lists were dangerous, especially where it was not evident whether they were intended to be exhaustive. Omission of the lists would be preferable to inserting "for example" or "notably". The paragraph as it stood was unduly long and its detailed references to categories of violations of rights might be confusing to a layman.

35. Mr. BHAGWATI agreed that it was preferable to state the principle contained in paragraph 8 in general terms, omitting the lists.

36. Mr. HENKIN proposed amending the phrase "reflect the understanding of the international community at the time of the drafting and adoption of the Covenant" in the first sentence of paragraph 8 because it raised sensitive questions regarding what was accepted by the international community at the time.

37. Mr. SCHEININ acknowledged that the first sentence could be deleted. He was also willing to delete the list of peremptory norms. The paragraph would then begin with a statement to the effect that article 4.2 clearly included two types of non-derogable norms. They were considered non-derogable either because of their peremptory nature or because they were viewed as unrelated to emergency situations. It could then be stated that the category of peremptory norms in the field of human rights was not exhausted by article 4.2, and a limited number of examples, including the presumption of innocence, could be given, making it clear that the list

was not exhaustive. The paragraph served an important purpose in opening the discussion of issues covered by non-derogable norms other than those contained in article 4.2. The issue of arbitrary arrest was addressed elsewhere in the draft general comment. The question of "severe discrimination" would no longer arise in the new version of paragraph 8.

38. Mr. KRETZMER considered that all the prerequisites for a fair trial constituted non-derogable obligations. If the presumption of innocence was singled out, it might give the impression that other aspects were less important.

39. Mr. KLEIN said he was not sure that all the aspects of a fair trial mentioned in article 14 constituted non-derogable obligations. That was a further example of the danger of listing peremptory norms. On the other hand, he agreed with Mr. Solari Yrigoyen about the non-derogable status of the provision of article 10.1 concerning humane treatment of prisoners. The Committee should at least reach a consensus on the examples selected.

40. Ms. CHANET, supported by Mr. YALDEN and Ms. GAITAN DE POMBO, said that, while the provisions of articles 9 and 14 were addressed in paragraph 11 of the draft general comment, States parties were merely enjoined in that context to consider whether certain measures potentially amounting to derogations from Covenant provisions were acceptable. In contrast to Mr. Klein, she considered that all the provisions of article 14 were non-derogable and of equal value, including the presumption of innocence. She was concerned in that connection to ensure consistency with General Comment No. 24, which also mentioned arbitrary arrest in relation to article 9 of the Covenant. But if some members of the Committee did not consider that they constituted peremptory norms, she would prefer not to cite any examples of such norms.

41. Mr. SCHEININ said he would be reluctant to mention the article 10 provision in paragraph 8 because it was addressed later in close connection with article 7. The fair trial issue might be resolved by referring to "certain fundamental principles of a fair trial, including the presumption of innocence". He had difficulty with the proposal to omit all examples in order to avoid inconsistency with General Comment No. 24. It had become clear during earlier discussions that considerable differences of opinion existed regarding the relationship between the two general comments. For that reason, he had deleted a subsequent paragraph dealing with the relationship between derogations and the possibility of entering reservations.

42. Mr. KRETZMER said that the point at issue was the consistency of general comments and not the relationship between derogations and reservations.

43. Mr. LALLAH said he thought it was inappropriate to try to make a connection between the two concepts. He agreed with Mr. Scheinin that some examples should be provided, stressing that they were not exhaustive. A large number of references to specific rights, on the other hand, might lead to controversy.

44. Ms. CHANET said that if the Committee listed peremptory norms in the general comment on reservations and the general comment on derogations, it had no choice but to ensure that the two were consistent.

45. The CHAIRPERSON invited Mr. Scheinin to redraft the paragraph in the light of the discussion.

Paragraph 9

46. Mr. SCHEININ said that paragraph 9 dealt with the ongoing international discussion of the notion of "fundamental standards of humanity", which introduced a human rights dimension into the formerly more common notion of "minimum humanitarian standards", which was closely associated with humanitarian law. The Secretary-General of the United Nations was reporting on the subject to the Commission on Human Rights and to that end was following developments on a number of fronts, including the Human Rights Committee's discussion of non-derogable rights. Other dimensions of relevance to the Commission's debate were the development of international criminal law and the identification by the International Committee of the Red Cross (ICRC) of customary norms of international humanitarian law. He felt that the draft general comment should refer to that process in order to link the Committee's understanding of non-derogable rights to more general developments in the field of international law. No specific conclusions were drawn and no examples were given, but the paragraph served as background for concrete findings later in the text. Thus, some of the issues later identified as establishing non-derogable rights protected under the Covenant were based on the "fundamental standards of humanity" project.

47. Mr. KLEIN said he was not sure that the paragraph was necessary. The last sentence repeated a point that had already been made in paragraph 6. The discussion of fundamental standards of humanity would be relevant to the Committee only if those standards had been converted into international obligations.

48. Ms. EVATT said her interpretation of the paragraph was that the Committee needed to be aware, in considering what the other obligations of States were under international law, that the content of those obligations had not been definitively determined because of the continuing international discussion aimed at identifying fundamental standards of humanity. As soon as they were identified and recognized as binding obligations, article 4.1 would become applicable to them. If her interpretation was correct, she suggested that it could be stated briefly and inserted in paragraph 6.

49. Ms. CHANET considered that the paragraph should be retained in some form because of its didactic and innovative quality. It would be inappropriate to ignore a discussion of such importance and of considerable relevance to the Committee's work.

50. Mr. SCHEININ supported Ms. Evatt's proposal provided that footnote 3, which indicated that the identification of other obligations under international law could not be restricted to a narrow interpretation of treaty obligations, was retained.

51. Mr. LALLAH observed that the Committee should not be perceived as working in an ivory tower within the confines of the Covenant. It had a more positive role to play not only in the development of international humanitarian law, but also in other areas of relevance to human rights. He therefore supported Ms. Evatt's proposal.

52. Mr. KLEIN said he would like to see the revised version before expressing endorsement. The addition to the non-derogable rights mentioned in the Covenant of non-derogable rights based on peremptory norms was quite acceptable. He had reservations, however, about any reference in that context to the very weak - albeit highly important - notion of fundamental standards of humanity. The Committee should be cautious in its attitude to emerging international obligations that had not yet been converted into customary or treaty law. However, he had nothing against a reference to the continuing process of formulation of rights that were perhaps becoming non-derogable.

53. The CHAIRPERSON noted that paragraph 9 would be deleted and replaced by a brief summary of its underlying idea in paragraph 6.

Paragraph 10

54. Mr. SCHEININ said that the paragraph referred to sources of international law other than the Covenant, according to which, if an action was defined as an international crime and an individual was held responsible for it, the State party concerned could not invoke the notion of derogation in order to justify such conduct. In other words, in addition to the responsibility of the individual, that of the State party was also incurred.

55. Ms. CHANET queried the reference in footnote 4 to articles 5-8 of the Statute of the International Criminal Court. It was one matter if the international crimes listed in those articles covered the non-derogable rights referred to in article 4.2 of the Covenant, but those crimes that were not covered by article 4.2 should be specified in the text; it should also be made clear that the State party could not use the pretext of a state of emergency provided for under article 4.1 to cover the criminal responsibility of individuals under its jurisdiction.

56. Mr. KLEIN said that, like Ms. Chanet, he would welcome clarification of the contents of articles 5-8 of the Statute. Another concern was the use of the rather broad term "international crimes". It could mean violations of human rights, although clearly, given the reference to the Statute, it was used in the present context in the sense of international criminal law. If the term was going to be used in the paragraph, it should be more clearly defined.

57. Ms. EVATT concurred with the views expressed by Ms. Chanet and Mr. Klein. As with paragraph 9, the purpose of paragraph 10 was to place in context the specific issues to be discussed in paragraph 11. The point the Committee wanted to make was that when defining the international legal obligations of States, the concept of international crimes involving individual criminal responsibility should be taken into consideration. The vast majority of international crimes perpetrated under State authority were covered by specific non-derogable rights or something recognized as a peremptory international norm. However, there might be instances of emerging international peremptory norms. What needed to be made clear in the paragraph was that it might be relevant to consider the way in which individual criminal responsibility attached to persons for actions taken under the authority of the State.

58. Mr. HENKIN endorsed that suggestion.

59. Mr. LALLAH, while expressing support for Ms. Evatt's suggestion, said that emphasis should be laid on the State causing the responsibility of the individual to be incurred, and not vice versa.

60. Mr. SCHEININ, following up Ms. Evatt's remarks, suggested that, as with paragraph 9, the substance of paragraph 10 could be transposed to paragraph 6. He was reluctant to make too broad a reference to international crimes; however, the reference to the Statute must be retained. Perhaps the scope of international crimes could be narrowed by providing illustrative examples of the crimes against humanity listed in the Statute in order to explain the notion of international crime and its relevance to the non-derogable obligations of the State party under the Covenant.

61. Mr. KLEIN expressed support for the wording proposed by Mr. Scheinin and its incorporation in paragraph 6.

62. Mr. KRETZMER asked whether the international crimes in question were covered by articles 6 and 7 of the Covenant, which protected non-derogable rights.

63. Mr. SCHEININ said that the reference to the Statute was particularly relevant since the international crimes listed therein included various forms of forced displacement, which constituted crimes against humanity and were not properly addressed by articles 6 or 7 or the other articles of the Covenant listed under article 4.2 as non-derogable.

64. Ms. CHANET said it was important that the paragraph should provide specific examples of international crimes listed in the Statute which were not covered by article 4.2 of the Covenant.

65. Mr. KLEIN said he would welcome the use of the term "crimes against humanity" rather than "international crimes". In order to meet Ms. Chanet's concern, he suggested that the Committee should verify whether all the crimes against humanity listed in articles 5-8 of the Statute were in keeping with article 4.2 of the Covenant.

66. Mr. HENKIN endorsed Ms. Chanet's remarks and expressed his preference for the use of the term "crimes against humanity".

67. Mr. SCHEININ said that, by way of example, the crime of forced displacement should certainly be mentioned. He would also seek another similarly appropriate example for inclusion in the text.

68. The CHAIRPERSON, summing up the discussion, said that the issues at stake were very substantive and required careful consideration. There was clearly agreement on the use of the term "crimes against humanity" instead of "international crimes" and on the need for a more precise reference to the relevant articles of the Statute listing crimes against humanity with respect to the non-derogable rights of the Covenant. He suggested that Mr. Scheinin should redraft the paragraph along those lines and resubmit it to the Committee for consideration.

69. It was so decided.

Paragraph 11

70. Mr. SCHEININ said that the paragraph referred to situations where sources of international law besides the Covenant supported the view that there were elements or dimensions of certain rights which could not legitimately be derogated from even though they were not specified as non-derogable rights. Subparagraphs (a)-(e) provided illustrative examples of the types of situations in question. It was important for the overall understanding of the general comment for the Committee to make concrete suggestions at that stage on the use of other sources of international law in understanding the institution of derogations from the Covenant.

71. Mr. SOLARI YRIGOYEN expressed concern about the way paragraph 11 had been drafted. The introductory part of the paragraph seemed to invite States parties to decide whether certain measures potentially amounting to derogations from the Covenant were acceptable or not. The first example given in subparagraph (a) was inappropriate, since it was in no circumstances acceptable for persons held in detention not to be treated humanely. That was merely one example, but the text of the paragraph as a whole raised a number of substantive problems. A further concern was that the Spanish text used the term "humanitarian treatment", which was not correct; it should be more closely aligned with the English version.

72. Mr. HENKIN said it was not just a translation problem. The fact was the Committee considered that article 10.1 of the Covenant should have been listed as a non-derogable provision and was trying to find a way of incorporating it by reference. He suggested that the Committee should follow the language used in article 10 by referring to "treated with humanity", which was preferable to both "humane treatment"and "humanitarian treatment".

73. Ms. CHANET said that on the whole she endorsed the paragraph. However, she suggested that the latter part of the introduction should be redrafted and made more positive in tone; as it stood, it implied that there was some doubt as to whether certain measures potentially amounting to derogation from Covenant provisions not mentioned in article 4.2 should be accepted. She further suggested that an additional subparagraph be drafted stressing the importance of not derogating from the provisions of article 20 of the Covenant.

74. Mr. KRETZMER questioned the somewhat contrived approach adopted to justify the consideration of certain issues as non-derogable rights, namely by linking them to rights already specified as such in the Covenant. He would have preferred an approach based on the principle, enshrined in the preamble to the Covenant, of rights derived from the inherent dignity of the human person. An appropriate formulation might be to the effect that any action which ran counter to the dignity of the human person should not be allowed, even in a state of emergency.

75. Mr. SCHEININ endorsed Ms. Chanet's suggestion to render the introductory part of the paragraph more assertive in tone. As to Mr. Kretzmer's suggestion, he considered that a reference to the preamble to the Covenant could be included as an additional argument for the interdependence of the various provisions of the Covenant. If some of the examples given in the paragraph seemed to be artificial, they could be deleted. What was important, however, was that the general comment should be persuasive in identifying essential elements which, when the Covenant was read as a whole, rendered certain provisions non-derogable, even though they

were not specified as such in article 4. The examples provided were not intended to be exhaustive, but rather to illustrate the arguments put forward in the preceding paragraphs. He would welcome some clarification on how to incorporate the reference to article 20 of the Covenant suggested by Ms. Chanet.

76. Ms. CHANET, agreeing on the usefulness of a reference to the preamble to the Covenant, endorsed Mr. Scheinin's suggestion that it should be used as an additional argument.

77. Mr. KLEIN said that article 4.2, which listed certain articles of the Covenant as being ones from which no derogation could be made, was a matter of concern to several members of the Committee. They would, of course, prefer all the rights set forth in the Covenant to be non-derogable on the grounds that all were based on respect for human dignity and thus inextricably linked. He recognized, however, that the Committee must be careful. Any proposal to extend the list of articles that were non-derogable needed to be very well-founded. The argument put forward in subparagraph (e) for regarding article 12 as a non-derogable provision seemed somewhat weak. The Committee must decide how seriously the actual text of the Covenant must be taken.

78. Mr. HENKIN said that he sympathized with the concern expressed by Mr. Klein. For his own part, he had never assumed that the list in article 4.2 was exclusive. Mr. Kretzmer, rather ingeniously, had tried to extend the list by making use of the preamble. It was quite possible that some provisions could be added, but the Committee must take care. He felt that Mr. Scheinin's draft handled the matter with appropriate caution.

79. Mr. BHAGWATI said that he also shared Mr. Klein's concern. However, although he appreciated the creative interpretation of article 4.2 employed in the draft, he felt that the Committee must not push its conclusions too far. The test should be whether the violation of a derogable article involved the violation of an article that was non-derogable.

80. Ms. CHANET said that paragraph 11 of the draft adopted a far from revolutionary approach, using such cautious terms as "potentially amounting to derogation". The Committee had already received a proposal from another human rights body that articles 19 and 14 of the Covenant should be made non-derogable. The Committee's response on that occasion had been at least as positive as paragraph 11 of the draft. She would be willing to draft an additional paragraph on article 20.

81. Mr. LALLAH suggested that the question of making the introductory language more positive should be left until after the various subparagraphs had been discussed. A decision could then be taken in the light of the discussion.

82. Mr. HENKIN said that the expression "inherent dignity of the human person" was used in various clauses of the Covenant. It was used more specifically in article 10.1 than it was in the preamble. The injunction that persons deprived of their liberty should be treated with humanity should probably not be derogable.

83. The CHAIRPERSON said that the Committee had just held a useful general discussion of paragraph 11 which would enable it to deal with the various subparagraphs more quickly.

He suggested that they should be taken separately, after which the Committee could consider the whole paragraph. He noted that it was generally agreed that Ms. Chanet should draft an additional paragraph on article 20. He emphasized that any proposal to make an additional right non-derogable would need to be buttressed by arguments sufficiently firm to make it unchallengeable.

84. Mr. LALLAH said that the Committee could decide on the wording of the introductory part of paragraph 11 after it had determined those points on which it was convinced there was clear authority for action within the Covenant itself.

85. Mr. KRETZMER pointed out that, in the discussion of paragraph 10, the references to crimes under public international law had been narrowed down to crimes against humanity. The same should be done in paragraph 11.

86. Mr. SOLARI YRIGOYEN questioned the use of the phrase "humane treatment" in subparagraph (a). The expression "be treated with humanity", taken from article 10.1, should be used instead.

87. Mr. KLEIN said he had no doubt that the substance of article 10.1, which was restated in the first sentence of subparagraph (a), was a rule that could not be derogated from. The question was why that was so. The explanation given in the draft was that it was intimately linked with articles 7, 16 and 18 of the Covenant, all of which were listed in article 4.2. He pointed out that that was not true in every case; sometimes violations of article 10.1 were linked to only one of them. He would prefer a clear firm statement to the effect that article 10.1 was non-derogable because it was a peremptory norm of public international law.

88. Mr. KRETZMER said he shared that view and hoped that Mr. Scheinin would be able to accept the suggestion.

89. Ms. EVATT also considered that, where it was possible to express an obligation in terms of a peremptory norm of international law, that should be done. Article 10.1 seemed to her to be such a case. Its substance was repeated in the preamble to the Covenant and in the Universal Declaration of Human Rights. It was also the case, however, in some of the issues that would be coming up, that there was an inextricable link to one of the non-derogable articles. She suggested that there were three categories of non-derogability: the first, those cases expressly provided for in article 4.2; the second, those constituting a peremptory obligation of international law; and the third, those norms which, if not observed, would render meaningless some other non-derogable right.

90. Mr. HENKIN said he was not as confident as Mr. Klein and Mr. Kretzmer about what was or was not a peremptory norm of international public law. He endorsed Mr. Solari Yrigoyen's proposal that the paragraph should keep to the language of the Covenant.

91. The CHAIRPERSON said that, if there were no further comments on subparagraph (a), he would invite Mr. Scheinin to make his observations.

92. Mr. SCHEININ said he did not know whether there was full agreement on how to formulate subparagraph (a). There was sufficient agreement, however, in order to use the language of article 10.1 and to state that all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person. The position that the right to humane treatment was non-derogable could be based first on peremptory norms of international law, and further supported by the provisions of the preamble and the Declaration, and by stressing the intrinsic link between article 10 and article 7.

93. The CHAIRPERSON said that the new wording would take Mr. Scheinin's observations into account and would replace and reinforce the existing subparagraph (a). He invited the Committee to continue with subparagraph (b).

94. Ms. CHANET observed that the matter broached in subparagraph (b) was less simple. She agreed that it was appropriate to link articles 14 and 15, but believed that the provisions of 15 should be cited in extenso. All its provisions had implications for article 14 also, in particular that regarding the imposition of a lighter penalty. It was a pity to open a gap between the absolute principle of non-derogability in the case of article 15 and the position in regard to 14 by saying that some aspects of article 14 could be derogated from during a state of emergency.

95. Ms. EVATT said that that difficulty must be faced. What the Committee was struggling towards in subparagraphs (b) and (c) was the ability to state clearly that a peremptory norm was involved, namely that no one might be deprived of his freedom without due process of law. If that was a peremptory norm of international law it was impossible to derogate from that part of article 14.1 which preserved the right to a fair trial in a situation of emergency, or that part of article 9.4 which enabled a person to challenge his detention before a court and thus went together with article 14.1 to support the principle of non-deprivation of liberty without due process. She did not find, in regard to subparagraph (b), that there was any necessary consequence from article 15 for article 14. Certainly, a court could not ignore article 15 because it was non-derogable, but what were its other consequences? Those aspects of article 14 which were peremptory norms, namely the right to due process and presumption of innocence, should simply be stated as such.

96. Mr. KRETZMER said that he shared Ms. Evatt's concern about the relationship between articles 15 and 14. He had no quarrel with the first part of the subparagraph which concerned the substantive principle of legality in criminal law. Article 14, however, went on to deal with the matter of criminal process, in the shape of a fair trial, and he found the connection there unconvincing. He accepted that the fundamental principle of fair trial should be respected even in a state of emergency, but had difficulty in finding a clear legal argument from the Covenant to that end. The Committee must be careful not to place restrictions on States parties in regard to states of emergency that were unacceptable. To take the example given by Ms. Evatt, everybody had the right to be brought before a court of law. In a state of emergency, as was accepted by the Fourth Geneva Convention, that might be impossible. It was important to avoid laying down restrictions that no State party would be able to take seriously.

97. There was one point in that connection that might become relevant when the Committee took up the fourth report of Peru. When the previous report had been examined, the delegation had tried to explain away the so-called "faceless judges" by saying that some 300 judges had

been assassinated and that since it was impossible to find anyone prepared to be a judge if his identity was to be exposed, the Government had had no choice but to accept such a system. His own argument then had been that, while it might be possible in certain circumstances that there could not be a fair trial, there must never be an unfair trial. Since unfair trial was totally excluded, other temporary measures must be allowed under international law until the end of the emergency.

98. Mr. SOLARI YRIGOYEN said he believed that Mr. Scheinin had been right to find an express link in the text of the Covenant between articles 14 and 15. It was true that there were parts of article 14 that could be derogated from, and others, such as the presumption of innocence, that could not. Rather than referring to the prohibition of retroactive punishment, it might be better to refer simply to the universal requirement of legality as expressed in article 11.2 of the Universal Declaration. He pointed out that the system of "faceless judges" in Peru, referred to by Mr. Kretzmer, had now been abolished.

99. Ms. CHANET said that unlike Ms. Evatt she saw a clear link between articles 14 and 15. France had bad memories of the administration of justice in states of emergency, as in the case of the special courts established under the Occupation.

100. The CHAIRPERSON, summing up, said that the Committee had adopted paragraph 6 of the draft general comment as amended, and paragraph 7, also with certain amendments. Paragraph 8 had been deleted, as had paragraph 9, on the understanding that certain parts of it would be incorporated in paragraph 6. Paragraph 10 had been adopted, with the new wording to be received from Mr. Scheinin, and the Committee had begun its consideration of paragraph 11. The discussion of the introduction to the paragraph had been postponed until after the rest was dealt with. Subparagraph (a) had been adopted, with the wording to be revised by Mr. Scheinin in the light of the discussion. The consideration of subparagraph (b) would be resumed at the next meeting.

The meeting rose at 1.10 p.m.